Supreme Court, U. S.
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No. 78-1221

In the Supreme Court of the United States

OCTOBER TERM, 1978

ZED DANIELS, PETITIONER

v.

RICHARD L. KIESER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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Petitioner brought this action in the United States District Court for the Northern District of Illinois, seeking damages from respondent, an Assistant United States Attorney for the Northern District of Indiana. Petitioner, a resident of Illinois, alleged that he had been subpoenaed to appear on October 15, 1976, in South Bend, Indiana, as a witness at the trial of Blandford Phoenix for interstate transportation of petitioner's stolen automobile.[1] At petitioner's request, respondent, who was prosecuting the case, sought and obtained a continuance

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[1]Because the court of appeals ordered the complaint dismissed, the complaint's factual allegations are assumed to be true for purposes of the petition. The allegations are summarized in the court of appeals' opinion (Pet. App. 7a-10a).

of Phoenix's trial. Petitioner's attorney told him that a new subpoena would issue for him to appear in Indiana on November 4, 1976.

On November 3 petitioner, not having received a subpoena, left Chicago for Bermuda.[2] Later that day a Deputy United States Marshal in Chicago discovered that petitioner's subpoena had not been served; he called petitioner's office and was informed of petitioner's travel plans and itinerary. The deputy marshal said that he would attempt to explain the situation to respondent. According to the complaint, respondent refused to accept the explanation.

On November 4, the day petitioner was expected in Indiana for the Phoenix trial, respondent asked the district judge presiding over the trial to issue a material witness warrant (see 18 U.S.C. 3149) for petitioner. Respondent told the court that petitioner was attempting to evade service of the subpoena, that petitioner had departed after being told that a subpoena had issued, and that respondent did not know when petitioner would return. The complaint alleged that these statements were false and that respondent knew they were false.

The district court issued the warrant. When petitioner returned to Chicago from Bermuda on November 9, he was arrested, booked and held in jail overnight. He was released the following day and subsequently testified at the Phoenix trial.

The complaint alleged that respondent's actions violated petitioner's rights under the Fourth and Fifth Amendments and under 18 U.S.C. 3149 and amounted to false imprisonment, malicious prosecution and abuse of process. He sought compensatory and punitive damages

[2]Petitioner did not allege that he made any attempt to ascertain the status of his subpoena or to determine whether he was still expected in Indiana the following day.

from respondent individually (Pet. App. 10a). The district court denied respondent's motion to dismiss the complaint on grounds of prosecutorial immunity (446 F. Supp. 1160, Pet. App. 1a-6a), but it certified the question for immediate appeal under 28 U.S.C. 1292(b).

The court of appeals reversed (586 F. 2d 64; Pet. App. 7a-16a). It held that under *Yaselli* v. *Goff*, 275 U.S. 503 (1927), *Imbler* v. *Pachtman*, 424 U.S. 409 (1976), and *Butz* v. *Economou*, No. 76-709 (June 29, 1978),[3] respondent was absolutely immune from liability in this action. The court noted that, in attempting to secure a material witness warrant in the Phoenix trial, respondent was not acting as an investigator or administrator but was " 'intimately associated with the judicial phase of the criminal process * * *' " (Pet. App. 14a, quoting *Imbler* v. *Pachtman, supra,* 424 U.S. at 430). The court also rejected petitioner's argument that there should be an exception to the rule of prosecutorial immunity where the plaintiff was a witness in a criminal prosecution rather than the defendant. The court agreed with respondent that " 'it would be strange public policy indeed which would take away the right to sue a prosecutor from one most likely to suffer prosecutorial abuse, the criminal defendant, while giving the same right to a class of persons [witnesses] less likely to suffer prosecutorial abuse' " (Pet. App. 15a; footnote omitted).

The court of appeals' decision is correct. That decision follows from *Imbler* and *Economou*, and petitioner suggests no plausible ground to distinguish this case from those. Petitioner does not dispute the court of appeals' conclusion that when respondent allegedly took the actions of which petitioner complains, he was acting as a prosecutor, not as an investigator or administrator (see *Imbler* v. *Pachtman, supra,* 424 U.S. at 430-431). Rather,

[3]*Economou* was decided after the district court's decision in this case.

petitioner contends that prosecutorial immunity should not protect a prosecutor who lies to a court (Pet. 8) and should protect a prosecutor only from former defendants, not former witnesses (Pet. 9-10).

Neither claim has merit. Neither has been accepted by any court of appeals.[4] The conduct that petitioner attributes to respondent is egregious (if it took place as the complaint alleges), but the inevitable result of prosecutorial immunity is to leave the "genuinely wronged" victim "without civil redress against a prosecutor whose malicious or dishonest action" injures him. *Imbler* v. *Pachtman, supra,* 424 U.S. at 427. "[T]he alternative of qualifying a prosecutor's immunity would disserve the broader public interest." *Ibid.* The allegation in *Imbler* was that the prosecutor there knowingly used perjured testimony (424 U.S. at 416), a charge at least as grave as the present one. But *Imbler* and *Economou* demonstrate that the focus of the immunity inquiry is not on the specific allegations of wrongdoing but on the functions to be protected. And the fact that disgruntled witnesses "are not a class prone to bring retaliatory litigation against prosecutors" (Pet. 10), even if true, does not justify a dilution of the prosecutor's immunity in those cases where former witnesses do bring "retaliatory litigation."

The result below does not "eliminate[ ] the only effective remedy which could deter [prosecutorial] wrongdoing" as petitioner contends (Pet. 11). The court of appeals correctly noted that "[i]f [respondent's] conduct is as reprehensible as the [petitioner] alleges, a criminal prosecution or disbarment might be available (see [*Imbler* v. *Pachtman, supra,*] 424 U.S. at 431, n. 34) * * *" (Pet. App. 16a). Such a course of action would not compensate a victim of a prosecutor's wrongdoing, but

[4]Petitioner does not contend that there is a conflict among the circuits.

that is the price of preserving the doctrine of prosecutorial immunity. See *Imbler* v. *Pachtman, supra,* 424 U.S. at 427; *Butz* v. *Economou, supra,* slip op. 30-31, 35.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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